

A Presentation by

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# LE RENDEZ-VOUS DE L'ASSURANCE TRANSPORTS Cannes April 2009



CESAM

# Forum Shopping and Anti-Suit Injunctions

by  
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## Context

- Written agreements
- How best to secure/enforce:
  - Drafting
  - Jurisdiction/Arbitration clause/law clause
  - Action when dispute arises

## Outline

- What is forum shopping?
- Is it permitted in breach of:
  - High Court jurisdiction clause?
  - London arbitration clause?
- Differences:
  - Inside EU (EFTA)
  - Outside EU (EFTA)

## Forum Shopping

- Most favourable Jurisdiction
- Not always same
- Depends on who represented



## Why Important?

- **Legal remedies:**
  - disclosure
  - limitation
  - costs
  - quality of justice
- **Practical factors:**
  - speed
  - enforcement



## Remedies/Tools Available

- Challenge jurisdiction
- Anti suit injunction
- Pre-emptive strike
- Challenge enforcement (difficult estoppel and Regulation 44)



## Remedies/Tools Available

***“ ...Navigating the tightrope between too little involvement in local proceedings and a default judgment, on the one hand, and unintended submission [to the jurisdiction of the foreign court] on the other is an exceptionally difficult exercise. It looks easy - do no more, it is said, than preserve objections to jurisdiction. But many systems, by linking substantive proceedings and jurisdictional challenge, make that easier said than done.”***

## Anti-Suit Injunctions

- Section 37 SCA 1981
- Restrains party from commencing or pursuing proceedings in foreign court
- Discretionary
- Does not bind foreign court
- Breach is contempt (but so what?)

## Opponent starts action in Non-EU Court

- In breach of exclusive English jurisdiction clause:
  - Challenge jurisdiction
  - Start action in English court
  - Oppose enforcement in E & W (difficulties)
  - Damages: cost of defending foreign proceedings

## Opponent starts action in Non-EU Court

- In breach of London arbitration clause:
  - Challenge jurisdiction (NY Convention)
  - Start London arbitration
  - Anti suit injunction
  - Oppose enforcement in E&W
  - Damages: costs of defending foreign proceedings

## Will you get your ASI?

- Possibly: is discretionary
- To be exercised with caution
- Only where interests of justice require
- Generally: good reason needed to show why not (Angelic Grace)
- But might be required to mediate!



## Impact EU Law

- Council Regulation 44/2001 (Brussels Convention 1968)
- In force 1 March 2002
- Direct effect all Member States (cf Denmark)
- Denmark bound by Brussels Convention
- EFTA nations bound by Lugano Convention

## Impact EU Law

- Generally governs where EU defendant can be sued
- Restricts ability of Courts of Members States to determine jurisdiction
- Based on “comity”, “mutual trust” (reality: full faith and credit)



## How does the Regulation Scheme Work?

- Two key provisions:
  - Article 23: exclusive jurisdiction clauses effective, but
  - Article 27: court first seized
  - (cf Article 1, arbitration)



## Opponent starts first in EU Court: clear problems

- In breach of English exclusive jurisdiction clause:
  - and action between same parties and same subject matter
  - despite Article 23 any later English action must be stayed (Gasser v MISAT 2003) (egregious delay...)
  - challenge jurisdiction or fight there
  - (Article 27 trumps Article 23)
  - (Position similar for “related” actions)

## What about an ASI?

- No!
- Turner v Grovit 2004
- “contrary to the spirit and intention of Convention” (hence Regulation)
- counter to the principle of “mutual trust” in legal and judicial systems of Member States
- even if opponent acting in bad faith to frustrate existing proceedings irrelevant

## Implications of Gasser and Turner

- Forum shopping not ended by Regulation (Convention)
- No anti suit injunction to restrain first action
- Risk of tactical litigation
- Delay (justice delayed is justice denied)
- Additional cost
- Home advantage: anomalous results



## Implications of Gasser and Turner

- 2003 Monitoring Reports on the  
Accession States
  - lack of public confidence
  - judicial corruption
- Grim reading....

## Implications of Gasser and Turner

*...“Efforts are still needed to improve the efficiency and transparency of the judiciary, so as to enhance the reliability of the quality of judgment... In general, the level of public trust in the efficiency and fairness in the judicial system remains low and the perception of corruption by the public is high... Corruption is perceived to be increasing from a relatively high level. It is considered to affect all spheres of public life. There has been very little progress in combating corruption, and the existing perception has been borne out in various [recent] high profile corruption cases...”*

## Opponent starts first in EU Court: the latest problem

- In breach of London arbitration clause
- Regulation (Convention) does not apply to arbitration
- Court “second seized” can decide jurisdiction
- ASI now longer available to support London arbitration clause:
  - FRONT COMOR

## Conclusions: Proceedings already started by Opponent

- **Europe:**
  - Court cases: compulsory stay and no ASI. Procedural disadvantage
  - Arbitration cases: no compulsory stay and no ASI
- **Outside Europe**
  - Court cases: no compulsory stay and ASI
  - Arbitration cases: ditto

## Conclusions: Proceedings contemplated, what to do?

- **Europe:**
  - Court cases: pre emptive strike but no ASI
  - Arbitration clauses: uncertain, pre emptive strike
- **Outside Europe:**
  - Court or arbitration: less pressure



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